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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON ARTHUR TRIMBLE,

Defendant and Appellant.

A147345

(Solano County  
Super. Ct. No. FCR291074)

Proposition 47, passed by the voters in November 2014, reclassified certain nonserious, nonviolent offenses from felonies to misdemeanors. The measure also enacted Penal Code section 1170.18,<sup>1</sup> which permits offenders to petition the superior court to redesignate their felony convictions and reduce their sentences based on the new misdemeanor classification.

Appellant challenges the trial court's denial of his petition to strike a one-year enhancement for a prior prison term based on a felony conviction that had subsequently been reduced to a misdemeanor pursuant to Proposition 47.

Concluding that the trial court erred, we shall reverse the judgment and remand the matter with directions to grant appellant's petition to strike the enhancement.

**FACTS AND PROCEEDINGS BELOW**

In January 2013, in Solano County Superior Court case No. 291074, appellant pleaded no contest to transportation of a controlled substance (Health & Saf. Code,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

§ 11379, subd. (a)) and admitted four prior prison term commitments. As specified by section 667.5, subdivision (b), all such commitments were felonies at that time. On that same date, in case No. 286093, appellant pleaded no contest to the unauthorized possession of a controlled substance pursuant to Health and Safety Code section 11377. In May of that year, the court sentenced appellant to a term of seven years in case No. 291074, suspended execution of sentence, and granted formal probation for five years. Six weeks later, appellant admitted to having twice violated the terms and conditions of that probation. The trial court then imposed the seven-year sentence that had been suspended in case No. 291074, and a consecutive eight-month term in case No. 286093.

About a year and a half later, on January 26, 2015, the public defender petitioned the court for modification of appellant's sentence because one of the four prior prison terms used to enhance the sentence in case No. 291074 had been reduced to a misdemeanor by Proposition 47. (§ 1170.18, subdivision (a)). Three weeks later the public defender withdrew the petition only as to case No. 291074. The trial court then granted the petition as to case No. 286093, reducing the prior felony to a misdemeanor.

On March 30, 2015, acting in propria persona, appellant sought to represent himself by filing a *Faretta* motion<sup>2</sup> seeking an order authorizing him to represent himself and also requesting relief under section 1170.18 in this case (No. 291074). On June 30, 2015, in this case, appellant asked the court to reduce the prior conviction in a 2007 case (No. 241139), of unauthorized possession of a controlled substance in violation of Health and Safety Code section 11377, which was the basis of one of the four one-year prior prison term enhancements in this case, from a felony to a misdemeanor. At the time appellant was convicted of that offense, possession of a controlled substance in violation of Health and Safety Code section 11377 was punishable as either a felony or a misdemeanor. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) As a result of Proposition 47 the offense was made punishable as a misdemeanor “unless the defendant ‘has one or more prior convictions’ for an offense specified in section 667, subdivision

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<sup>2</sup> *Faretta v. California* (1975) 422 U.S. 806

(e)(2)(C)(iv).” (*Lynall*, at p. 1108.) Because appellant had no such prior convictions, the court granted the reduction. In doing so, the court stated that it understood appellant to be saying, “ ‘First I want to get my misdemeanor on the prison prior.’ And then I suspect he will want to say, ‘[b]ut if you gave me that prison prior on the sentence, now that it’s reduced to a misdemeanor, and I want a year off my [present] sentence.’ ” Appellant affirmed that was his intention.

A week later, on July 7, 2015, the court re-appointed the public defender and asked the parties to file briefs as to whether an enhancement for a prior prison term should be stricken in case No. 291074 due to the court’s reduction to a misdemeanor of the offense for which appellant served the prior prison term. The court explained the situation as follows: “In 291074 . . . [h]e received three years, which was the mid-term. The second case, 286093, he had received 8 months consec[utive] for [conviction of violating Health and Safety Code section] 11377. That was already taken off his sentence. And then he had four prison priors for a total of 7 years. So it got reduced from . . . 8 to 7.” The court went on to explain to the prosecutor that appellant was now trying to “get it reduced to six years” because of the reduction to a misdemeanor of the offense for which appellant served a prior prison term.

The trial brief filed by the public defender, like the brief filed by appellant in this appeal, relied on subdivision (k) of section 1170.18, which states that any felony conviction that is recalled and resentenced under subdivision (b) of the statute “*shall be considered a misdemeanor for all purposes*,” except for the right to own or possess firearms. (Italics added.) The public defender maintained that the phrase “for all purposes” must be given its plain meaning, so that such a conviction cannot later be used as a prison prior; and therefore any later sentence based on the prior “must be stricken when requested by a defendant.”

The district attorney first argued that the enhancement should not be stricken because “generally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun” (*People v. Howard* (1997) 16 Cal.4th 1081, 1089) and the exception to that rule carved out by section 1170, subdivision (d), which in certain

circumstances allows a court to “recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced,” does not apply because more than 120 days had passed since the challenged sentence was imposed. This argument is not advanced by the People on this appeal and we therefore do not address it.

The People’s second argument in the trial court was that section 1170.18 does not authorize recall and resentencing in this case. This is assertedly so because the plain language of section 1170.18 subdivision (a), authorizes the trial court to resentence a defendant “currently serving a sentence for a conviction” if the offense would have been “a misdemeanor under [Proposition 47] had [that Act] been in effect at the time of the offense.” This issue is also not raised by the People in this court, presumably because, as we have said, Health and Safety Code section 11377 was later reduced to a misdemeanor by Proposition 47, and appellant could not have received a prison term for that offense (§ 1107.18, subd. (a)) had Proposition 47 been in effect at the time appellant committed the prison prior at issue. (Health & Saf. Code, § 11377, subd. (b).)

The district attorney’s third argument in the trial court, which *is* raised by the People here, is that appellant’s prior prison term was completed within the meaning of section 667.5, subdivision (g), and the imposition of an enhancement on that basis “remains valid” because, like all enhancements authorized by section 667.5, subdivision (b), the additional punishment is imposed “to punish individuals” who have shown that they are “hardened criminal[s] who [are] undeterred by the fear of prison.” (*People v. Jones* (1993) 5 Cal.4th 1142, 1148.) Because Proposition 47 has not altered appellant’s status as such a recidivist, the People maintain that striking the enhancement would conflict with the policy of section 667.5. We address this contention in the body of this opinion.

Although the People did not in the trial court affirmatively assert that Proposition 47 has no retroactive effect, they properly raise it here in opposition to appellant’s attribution of such effect to the Act and we will address it.

At a hearing on September 18, 2015, after lamenting the dearth of case law providing any useful guidelines, and relying on the absence of any authority upon which to strike a prior prison term enhancement subsequently reduced to a misdemeanor pursuant to Proposition 47, the trial court denied the petition to strike the prior “without prejudice.” The reason for this ruling was unexplained.

Timely notice of this appeal was filed on November 2, 2015 and a request for a certificate of probable cause was granted on January 13, 2016.

### **DISCUSSION**

Our review is de novo as the question presented is solely one of law. (See, e.g., *Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 916.)

As we shall explain, we conclude that the trial court erred in denying the petition to recall and resentence, and therefore shall reverse the ruling and remand the case for resentencing in the trial court.

In November 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which reclassified numerous theft and drug felonies and “wobblers” as misdemeanors. (§ 1170.18.) Under subdivisions (a) and (b) of section 1170.18, defendants who, like appellant, are currently serving sentences for convictions of felonies that after Proposition 47 are considered misdemeanors can petition for recall of their sentences before the trial court that entered the judgment. Subdivision (b) provides that if the criteria of subdivision (a) are satisfied the petitioner’s felony sentence “shall be recalled and the petitioner resentenced to a misdemeanor” pursuant to specified provisions of the Health and Safety Code and the Penal Code. Significantly, as previously noted, subdivision (k) of section 1170.18 provides that “[a]ny felony conviction that is recalled and resentenced under subdivision (b) . . . shall be considered a misdemeanor for all purposes.” (§ 1170.18, subd. (k).)

Appellant acknowledges, and the Attorney General apparently agrees, that there appears to be no citable case law on the precise issue of whether the voters who enacted Proposition 47 intended the reduction of a prior conviction to a misdemeanor would also

result in the reduction of an enhancement for a prior prison term under section 667.5, subdivision (b), at least where, as here, the defendant had already been sentenced on the enhancement.<sup>3</sup>

## I.

### *The Trial Court Misinterpreted Section 1170.18*

Resting on the statement in subdivision (k) of section 1170.18 that a felony conviction recalled and resentenced “shall be considered a misdemeanor for all purposes” except firearm restrictions, appellant relies on *People v. Park* (2013) 56 Cal.4th 782 (*Park*), which interprets that phrase as used in section 17, subdivision (b), which is the source of the language also used in subdivision (k) of section 1170.18. In *Park* the trial court imposed a five-year enhancement of the defendant’s sentence pursuant to section 667, subdivision (a), based on his prior conviction of a serious felony. After the defendant had pleaded guilty to that charge, the court had suspended imposition of sentence and granted probation. Later, but before the defendant committed the current crimes, the trial court had reduced the prior offense to a misdemeanor under section 17, subdivision (b)(3), and then dismissed it pursuant to section 1203.4, subdivision (a)(1). (*Park*, at p. 787.) The Court of Appeal held that the conviction remained a prior serious felony for purposes of sentence enhancement notwithstanding its reduction to a

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<sup>3</sup> As appellant points out, on March 30, 2016, the California Supreme Court granted review in *People v. Valenzuela* (2016) 244 Cal.App.4th 692, case No. S232900, which does discuss issues presented in this case, and three other similar cases in which briefing has been deferred are awaiting the decision *Valenzuela*: *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; and *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539.

All four of the above cases are published in the official advance sheets of the California Official Reports, but not in the bound volumes of the Reports, and are not citable because in all of them review was granted prior to July 2016, the effective date of the current edition of the California Rules of Court. Under new subdivision (e)(1) of rule 8.1115, if the Supreme Court grants review of a published Court of Appeal decision, that decision now remains published and citable—“for potentially persuasive value only”—while review is pending.

misdemeanor, and affirmed the five-year enhancement. (*Ibid.*) The Supreme Court reversed the Court of Appeal, concluding that after reduction of the prior offense to a misdemeanor it could not be used under section 667, subdivision (a), to enhance the defendant's sentence. (*Park*, at p. 787.)

*Park* is relevant for two reasons. Because, like section 1170.18, section 667 was added by voter initiative, the opinion discusses the nature of judicial review of such a statute. Also, section 17, subdivision (b) is like subdivision (k) of section 1170.18 as it also authorizes reduction of a crime punished as a felony (though only one that, as a “wobbler” could also have been punished as a misdemeanor), and also states that after the reduction the crime becomes “a misdemeanor for all purposes.” (§ 17, subd. (b).) Indeed, the drafters of Proposition 47 borrowed the “misdemeanor for all purposes” language in section 1170.18, subdivision (k), from section 17, subdivision (b). (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 745 (*Abdallah*).)

With respect to judicial review, *Park* states that when interpreting a statute added by voter initiative “it is the voters’ intent that controls” but judicial interpretation of such a measure is nonetheless “governed by the same rules that apply in construing a statute enacted by the Legislature. [Citations.] We therefore look to ‘the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.’ [Citations.] Once the electorate’s intent has been ascertained, the provisions must be construed to conform to that intent. [Citation.] ‘[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.’ [Citation.]” (*Park, supra*, 56 Cal.4th at p. 796.)

The *Park* court observed that a “wobbler” becomes “a misdemeanor for all purposes” under section 17, subdivision (b)(3), “when the court takes affirmative steps to classify the crime as a misdemeanor. When the court properly has exercised its discretion to reduce a wobbler to a misdemeanor under the procedures set forth in section 17(b), the statute generally has been construed in accordance with its plain language to mean that the offense is a misdemeanor ‘for all purposes.’ [Citations.]” (*Park, supra*, 56 Cal.4th at p. 793.) Noting that reduction of a wobbler to a misdemeanor under section

17(b) “generally precludes its use as a prior felony conviction in a subsequent prosecution” (*Park*, at p. 794), the court explained that “one of the ‘chief’ reasons for reducing a wobbler to a misdemeanor ‘is that under such circumstances the offense is not considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purpose of increasing the penalty for a subsequent crime.’ ” (*Ibid.*, quoting *In re Rogers* (1937) 20 Cal.App.2d 397, 400-401.) The only situation in which a court may continue to use a prior conviction reduced to a misdemeanor under section 17(b) as a felony is when the Legislature “has explicitly made clear its intent to treat a wobbler as a felony for specified purposes notwithstanding a court’s exercise of discretion to reduce the offense to a misdemeanor.” (*Ibid.*)<sup>4</sup>

Relying on the general presumption that those who enact statutes do so with an awareness of existing statutes and relevant judicial decisions (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171), appellant maintains that in passing Proposition 47 the electorate must be deemed to have been aware of the determination by the Supreme Court that, as employed in section 17, subdivision (b), the phrase “misdemeanor for all purposes” means exactly that in the absence of any indication in the language or history of a statute that the lawmaker intended otherwise. Appellant emphasizes that nothing in the language of section 1170.18 indicates any intention of the electorate to place any limitations on the phrase “misdemeanor for all purposes,” except the restrictions on the possession or use of firearms by felons that it specifically exempted. (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1227 (*Alejandro N.*) [“The plain language of section 1170.18, subdivision (k) reflects the voters intended the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearms restrictions”].)

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<sup>4</sup> Although the issue here was not before the court in *Park*, the opinion does contain dicta that there was “no dispute that . . . defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.” (*Park, supra*, 56 Cal.4th at p. 802.)

The Attorney General rejects appellant's reasoning because it ignores the difference between enhancements which go to the nature of the offense rather than to the nature of the offender, such as those authorized by section 667.5, subdivision (b). (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) Noting that the purpose of that enhancement statute "is 'to punish individuals' who have shown that they are 'hardened criminal[s] who [are] undeterred by the fear of prison' " (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115), the People argue that section 677.5, subdivision (b) reflects a legislative conclusion that a prior conviction resulting in a prison term is deserving of greater punishment than a prior conviction involving a lesser degree of confinement, because that statute targets not just any recidivist but a particularly incorrigible kind of recidivist: the " 'felon whose prior *prison term* failed to deter future criminality.' [Citation.]" (*People v. Levell* (1988) 201 Cal.App.3d 749, 754, quoting *People v. Bruno* (1987) 191 Cal.App.3d 1102, 1107.) Given this legislative purpose, the People contend that reclassification of appellant's drug possession offense as a misdemeanor did not change the immutable facts that appellant served a prior prison term and that punishment did not deter him from committing a subsequent drug offense. According to the People, appellant's recidivism makes him " 'just the sort of example that the Legislature had in mind when it set up its scheme to inflict additional punishment for repeat offenders.' [Citation.]" (*In re Preston*, at p. 117.)

The problem with this argument is that nothing in section 1170.18 suggests—let alone "explicitly ma[kes] clear" (*Park, supra*, 56 Cal.4th at p. 794)—an intent to treat an offense that has been reduced to a misdemeanor as a felony in a subsequent prosecution of the same offender. Such an intention is hard to imagine, as it would deny the benefits of Proposition 47 to an enormous number of nonviolent offenders eligible for relief under that measure, notwithstanding a court's exercise of discretion to reduce the offense to a misdemeanor.

Furthermore, if Proposition 47 had been in effect at the time appellant committed the subject prior he would not have been subject to a prison term, because Proposition 47 reduced the unauthorized possession or use of a controlled substance in violation of

section 11377 from a felony to a misdemeanor. (Health & Saf. Code, § 11377 subd. (b).) As the Supreme Court has said, “ ‘[o]ne of Proposition 47’s primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative.’ ” (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992 (*Harris*).) The Act also expressly states an intent to ‘[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes, like petty theft and drug possession, unless the defender has prior convictions for specified violent or serious crimes.’ ” (Voter Information Guide, General Elec. (Nov. 2014) text of Prop. 47, § 3, subd. (3), p. 70.)

Considering that, absent a statutory command to the contrary, reduction of a wobbler to a misdemeanor under section 17, subdivision (b) precludes its use as a prior felony conviction in a subsequent prosecution (*People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1390), the same rule should apply to the reduction of a felony to a misdemeanor under section 1170.18. The reduction of a violation of Health and Safety Code section 11377 to a misdemeanor by the voters who enacted Proposition 47 demonstrates that this offense is no longer “ ‘considered to be serious enough to entitle the court to resort to it as a prior conviction of a felony for the purpose of increasing the penalty for a subsequent crime.’ ” (*Park, supra*, 56 Cal.4th at p. 794, quoting *In re Rogers, supra*, 20 Cal.App.2d at pp. 400-401.)<sup>5</sup>

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<sup>5</sup> Our conclusion that the challenged enhancement must be stricken renders it unnecessary to address appellant’s claims under the equal protection clauses of the Constitutions of the United States and the State of California, which are advanced in the event the People argue on appeal that his reduced conviction provides no relief from the challenged enhancement, but admit “that those sentenced post-Proposition 47 cannot be subject to such an enhancement under section 667.5 subdivision (b).”

## II.

### ***Proposition 47 is Not Impermissibly Retroactive***

The People maintain that appellant's argument that redesignation of the felony as a misdemeanor can prevail "only if Penal Code section 1170.18, subdivision (k) gives the redesignation retroactive effect, but Proposition 47 does not have that effect." The People's claim is based almost entirely on *People v. Rivera* (2015) 233 Cal.App.4th 1085 (*Rivera*).

In that case, after pleading no contest to felony possession of a controlled substance, the defendant was granted probation without imposition of sentence, and the trial court subsequently reduced his offense to a misdemeanor under section 1170.18. (*Rivera, supra*, 233 Cal.App.4th at pp. 1090-1091.) The Court of Appeal held that it, rather than the appellate division of the superior court, had jurisdiction over the appeal because Rivera's case was a felony for purposes of appellate jurisdiction. The court explained that "[i]n criminal cases, the Courts of Appeal have 'appellate jurisdiction over appealable orders from 'felony case[s]'' and 'the appellate divisions of the superior courts, by contrast, have appellate jurisdiction over appealable orders from 'misdemeanor case[s].''" [Citations.] [¶] Section 691 defines a 'felony case' as 'a criminal action in which a *felony is charged* and includes a criminal action in which a misdemeanor or infraction is charged in conjunction with a felony.' (§ 691, subd. (f).) . . ." (*Rivera*, at p. 1093.) Additionally, *Rivera* notes that under section 859a "[a] felony case includes an action in which the defendant is charged with [¶] (A) A felony and a misdemeanor or infraction; . . . [¶] (B) A felony, but is convicted of only a lesser offense; or [¶] (C) *An offense filed as a felony but punishable as either a felony or a misdemeanor, and the offense is thereafter deemed a misdemeanor under . . . section 17(b).*" " (*Rivera*, at p. 1095.)

In the course of explaining why it rather than the appellate division of the superior court had appellate jurisdiction over the defendant's appeal, the *Rivera* court concluded that "[n]othing in the text of Proposition 47 or the ballot materials for Proposition 47 . . . contains any indication that Proposition 47 or the language of section 1170.18,

subdivision (k) was intended to change preexisting rules regarding appellate jurisdiction.” (*Rivera, supra*, 233 Cal.App.4th at p. 1100.) For these reasons, the court presumed “that the phrase ‘shall be considered a misdemeanor for all purposes’ in section 1170.18, subdivision (k) does not apply retroactively.” (*Ibid.*)

The retroactivity *vel non* of subdivision (k) of section 1170.18 is admittedly unclear in the case law, which is presumably why the issue is now being considered by the Supreme Court. However, like the court in *Alejandro N., supra*, 238 Cal.App.4th 1209, we do not think *Rivera*’s analysis, which focuses on a jurisdictional issue not present in this case, is persuasive.

In *Alejandro N.*, which is far more on point, the trial court reduced a juvenile offender’s maximum period of confinement to the misdemeanor level (Welf. & Inst. Code, § 726) for an offense previously designated a felony and reclassified as a misdemeanor under Proposition 47, but declined to reclassify the offense from a felony to a misdemeanor under subdivision (k) of section 1170.18, so that the juvenile could be required to give a DNA sample to law enforcement upon arrest for a felony and that information could be retained in the state database. (*Alejandro N., supra*, 238 Cal.App.4th at pp. 1216-1217.)

Granting the juvenile’s writ petition in part, the Court of Appeal held that the juvenile was entitled to redesignation of the adjudication to a misdemeanor under section 1170.18, and that DNA collection was therefore unauthorized. As the court stated, “Proposition 47 made its reclassification benefit available to eligible offenders on a retroactive basis by adding section 1170.18 to the Penal Code. Section 1170.18, subdivision (k) expressly addresses the impact of an offender’s successful reclassification of his or her felony offense to a misdemeanor, stating: ‘Any felony conviction that is recalled and resentenced . . . or redesignated as a misdemeanor . . . *shall be considered a misdemeanor for all purposes, except that* such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under [the firearm restriction statutes].’ ” (*Alejandro N., supra*, 238 Cal.App.4th at p. 1227.)

*Alejandro N.* went on to rely on the plain language of subdivision (k) of section 1170.18, which “reflects the voters intended the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. Because the statute explicitly addresses what, if any, exceptions should be afforded the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so.”<sup>6</sup> (*Alejandro N.*, *supra*, 238 Cal.App.4th at p. 1227.)

The *Alejandro N.* court was aware that the recent opinion in *Rivera* had expressed a different view of the effect of section 1170.18, subdivision (k) but distinguished and disregarded *Rivera* on the ground that, “[u]nlike the circumstances here,” the conclusion in that case “was supported by the governing statutes and rules that define the meaning of felony cases for purposes of appellate jurisdiction.” (*Alejandro N.*, *supra*, 238 Cal.App.4th at p. 1227, fn. 8.) We also believe *Rivera* should be limited to that issue.

*Alejandro N.* is not the only case concluding that Proposition 47 has a retroactive aspect. *Abdallah*, *supra*, 246 Cal.App.4th 736 also persuasively explains why application of section 1170.18, subdivision (k) to appellant should not be deemed impermissibly retroactive. After Abdallah was convicted of drug and firearm offenses in 2014, the trial court imposed an aggregate prison sentence of five years, which included a one-year enhancement pursuant to section 667.5, subdivision (b), which excludes from the prior prison term enhancement defendants who had not been convicted of a felony or

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<sup>6</sup> Since *Alejandro N.* was decided the Legislature amended section 299, subdivision (f), by inserting section “1170.18” among the statutes that do not authorize a judge to relieve a person of the duty to provide a DNA sample. (*In re J.C.* (2016) 246 Cal.App.4th 1462, 1472; accord *People v. Harris* (2017) \_\_\_\_ Cal.App.5th \_\_\_\_ [2017 WL 3883795] [court that decided *Alejandro N.* held, in light of amendment, expungement of a DNA sample was no longer permitted for a defendant whose felony conviction was reduced to a misdemeanor under Prop. 47].) However, *Alejandro N.* remains good law and the subsequent amendment of the statute relevant to that case does not change our analysis.

committed to prison or jail custody within five years of release from incarceration. This enhancement had been imposed on the ground that the defendant had been released on parole in 2005 from a driving under the influence (DUI) conviction he had suffered in 2002, and then had been arrested less than five years later in 2009 for a new felony, possession of methamphetamine, for which he was convicted in 2011. (*Abdallah*, at pp. 739-740.)

The Court of Appeal modified the 2014 judgment by striking the one-year prior prison term enhancement, concluding Abdallah no longer qualified for his 2002 felony conviction for DUI. At the time of his 2011 conviction for possession of methamphetamine, the unauthorized possession of controlled substance (Health & Saf. Code § 11377) was a “wobbler.” (See *Abdallah, supra*, 246 Cal.App.4th at p. 744.) The appellate court concluded that Proposition 47 precluded the trial court from using the 2011 conviction for possession of methamphetamine as a felony merely because it was a felony at the time Abdallah committed the offense. (*Abdallah*, at pp. 740, 747.)

In reaching this result, the Court of Appeal rejected the People’s argument that the prior prison term enhancement applied to Abdallah because he reoffended within five years of his release on parole on the 2002 conviction, and reduction of the offense to a misdemeanor under Proposition 47 was inconsequential because the Proposition does not purport “to ‘go back in time’ and apply retroactively to every affected offense in every context.” (*Abdallah, supra*, 246 Cal.App.4th at p. 746.) The *Abdallah* court took the position that finding Abdallah ineligible for the one-year enhancement under section 667.5, subdivision (b) “does not apply Proposition 47 retroactively.” (*Abdallah*, at p. 746.) As the court explained, “[t]he trial court did not use Abdallah’s 2011 conviction as if it were a felony conviction for purposes of imposing the prior prison term enhancement until after the court had recalled Abdallah’s 2011 sentence and resentenced him under Proposition 47. The court did not reach back in time to resentence Abdallah in the current case based on the redesignation of a predicate offense under section 1170.18, subdivision (f), for the prior prison term enhancement.” (*Ibid.*)

For this reason, the *Abdallah* court distinguished the case from those holding that Proposition 47 does not apply retroactively to redesignate predicate offenses as misdemeanors for purposes of imposing sentencing enhancements where the original sentence was imposed before the enactment of Proposition 47. (*Abdallah*, *supra*, 246 Cal.App.4th at p. 747, citing, as examples, *People v. Williams*, *supra*, 245 Cal.App.4th at p. 463; *People v. Carrea*, *supra*, 244 Cal.App.4th at p. 971; *People v. Ruff*, *supra*, 244 Cal.App.4th at p. 943, all of which, as earlier noted, are now under review by the Supreme Court.) “Indeed,” the court stated, “those cases suggest that where, as here, a prior conviction is no longer a felony at the time a court imposes a sentence enhancement under section 667.5, Proposition 47 precludes the court from using that conviction as a felony merely because it was a felony at the time the defendant committed the offense.” (*Abdallah*, at p. 747.)

Finally, we think that the “retroactive” application of Proposition 47 described in *Alejandro N.*, *Abdallah*, and other cases must have been contemplated by the enactors of Proposition 47 because such application is implicit in the recall and resentencing procedure established by subdivisions (b) and (g) of section 1170.18; those subdivisions are referred to in subdivision (k) (which states that “[a]ny felony conviction recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes. . . .”)

We conclude that, as applied to appellant, Proposition 47 is not impermissibly retroactive.

### III.

#### ***The Counts Dismissed as Part of the Plea Bargain Cannot be Reinstated by the Prosecution***

Anticipating we might find that the challenged enhancement should have been stricken, the People maintain that in that event the prosecutor should be given the opportunity to reinstate the counts dismissed as part of the original plea agreement; presumably, this includes the charges originally made in case No. 286093, as well as

those in case No 291074. This contention is based almost entirely on *People v. Collins* (1978) 21 Cal.3d 208 (*Collins*), a clearly inapposite case.

In *Harris, supra*, 1 Cal.5th 984, which was decided after the close of briefing in this case, the Supreme Court addressed the question whether the result of *Collins* (allowing a party to rescind a plea agreement when a subsequent change in the law deprives it of the benefit of its bargain), or the rule in *Doe v. Harris* (2013) 57 Cal.4th 64, (holding that entering into a plea agreement does not insulate the parties “from changes in the law that the Legislature has intended to apply to them” (*id.* at p. 66, italics added) applied to the factual situation in *Harris* in which, as in the present case, the change in the law was effectuated by Proposition 47. The *Harris* court found the situation in *Collins* distinguishable from that at issue in *Harris* (and here) both substantively and procedurally because it was not the Legislature, but the electorate, that enacted Proposition 47, and the electorate clearly intended the change to apply to the parties to a future plea agreement comparable to that in *Harris* and the present case.<sup>7</sup> Accordingly, as in *Harris*, the opinion that governs the present case is not *Collins* but *Doe v. Harris, supra*, 57 Cal.4th 64.

Accordingly, when appellant seeks to have his sentence recalled under Proposition 47, the People are not entitled to set aside the plea agreement.

### **DISPOSITION**

For the foregoing reasons, the judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

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<sup>7</sup> The *Harris* court also distinguished *Collins* because in that case the People sought to withdraw from the plea agreement before sentencing and the change in the law decriminalized the offense to which the defendant had pled, thereby eviscerating the judgment and the underlying plea bargain entirely, before the judgment had been entered. (*Harris, supra*, 1 Cal.5th at p. 993.)

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.